In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 376

GEORGE K. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a jury trial in the United States District Court for the Middle District of Tennessee on five counts of an indictment charging mail fraud in violation of 18 U.S.C. 1341 and 1342. On July 22, 1965, he was sentenced to periods of imprisonment totalling 2 years (Tr. 162).[1] The court of appeals affirmed *per curiam*. (Pet. App B)

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[1] "Tr." refers to a transcript of trial proceedings, which we are lodging with the Clerk of this Court. Other record references are to the defendant's appendix ("D.App.") in the court below, which is on file with this Court.

The judgment of the court of appeals was entered on May 2, 1967. The petition for a writ of certiorari was filed on July 15, 1967 and is therefore out of time under Rule 22(2) of the Rules of the Supreme Court. In any event, petitioner's claim—that there was deliberate impropriety on the part of government counsel in cross-examining a witness at trial—does not warrant further review.

The government's evidence was presented in part by coin collectors from various areas of the country, who testified that their published offers to exchange rare coins were answered by letters from one "James R. Watson" of a Portland, Tennessee, post office address, who instructed them to forward their coins to that address and promised that the trade desired would be sent by return mail. The collectors forwarded their coins and received no reply or trade in return (see, *e.g.*, Tr. 11-16; 18-20; 24-27). A handwriting expert testified that all of the letters introduced into evidence at trial bearing the signature "James R. Watson" had been written by petitioner (Tr. 103).

In defense, petitioner produced as a witness one Sircy, a co-defendant against whom the mail fraud charges had been dismissed in view of his conviction and minimum mandatory sentence for narcotics violations (D. App. 10a). In his direct examination, Sircy admitted that he was then incarcerated for violation of the narcotics laws and testified that the mail fraud scheme was his. He said that petitioner wrote the letters thinking that they related to legitimate

trades by an uncle of Sircy (D. App. 6a-8a). He said he had "shamelessly used" petitioner's friendship by deceiving him into writing the letters; he ended his direct testimony with an apology to petitioner and another co-defendant (D. App. 6a-8a). Thereafter practically all of the examination that followed by both counsel and the court was directed toward eliciting why petitioner, out of friendship for a man he had known for less than a year, would write, within some three or four days, between two hundred and three hundred letters without material compensation. For example, government counsel asked whether petitioner had been led to believe that Sircy's uncle could not read and write, whether petitioner had been paid anything, whether Sircy had bought coins from petitioner (a dealer), or whether the two men were "close" friends with frequent contacts. (D. App. 9a-11a). Twice Sircy was asked, without objection, whether he had supplied petitioner with narcotics, and he answered in the negative (D. App. 10a-11a). On redirect and recross, Sircy was questioned about any implied promise of gain to petitioner. There then occurred the colloquy about which petitioner complains (D. App. 14a):

> Q. [Government Counsel] Who did you sell narcotics to?
>
> A. [Sircy] Well, I'm not on trial for any of my past deeds. Your Honor, would it be necessary for me to answer that question?
>
> THE COURT: I don't think so. Not unless you can show it is pertinent.

MR. WILSON [Defense Counsel]: I will instruct him to answer, if Your Honor please, but it would be very embarrassing, I think if he did.

By Mr. Shriver [Government Counsel]:

Q. Do you know whether Mr. Fisher is an addict or not?

A. No, I do not.

Q. You don't know?

A. No.

Q. Do you suspect he is?

A. No, I never had any reason to suspect.

MR. WILSON: We object to that suspicions.

THE COURT: Sustained. * * *

The sole defense objection at the time was that the witness had been asked about "suspicions" (D. App. 14a).[2]

In these circumstances, it is evident that government counsel was attempting in good faith to ascertain the credibility of the witness and of the defense's "innocent tool" theory. If, for example, Sircy had been supplying petitioner with narcotics, or anything of value, that fact would have a bearing upon the alleged scheme and petitioner's role in it. Any prejudice flowing from the questions could hardly be significant in view of direct defense testimony of petitioner's friendship with the witness, who had admitted, in response to questions by petitioner's counsel,

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[2] At the conclusion of the trial defense counsel moved for a mistrial on the basis of these questions (Tr. 137). In a colloquy out of the presence of the jury, the United States Attorney indicated that petitioner's record (which the government had not used since petitioner had not taken the stand) showed that petitioner was an addict (Tr. 138).

that he had a criminal record for violation of the narcotics laws. No answers were elicited that were incriminating to petitioner; he did not request instructions with respect to the matter and indicated satisfaction with the final charge (Tr. 154). The court below held (Pet. App. A4-A5):

> [D]efense counsel neither objected to the questioning nor moved for a mistrial at the time the questions were asked, and indeed stated that he would instruct the witness to answer. Hence, even if we assume that the questioning by the government was improper, the acquiescence of defense counsel would preclude reversal except in a case where manifest injustice would result. * * * This is not such a case.

That holding does not warrant further review.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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